IN THE

Supreme Court

OF

NEWFOUNDLAND,

DECEMBER TERM, 1837.

1ST. VICTORIA.

THE HONOURABLE HENRY JOHN BOULTON, CHIEF JUSTICE OF THE SAID ISLAND, *Plaintiff*;

VS.

PATRICK MORRIS, JOHN KENT, AND JOHN VALENTINE NUGENT, *Defendants*.

Substance of the Arguments of the Plaintiff in support of his right to try this Cause before the Honourable AUGUSTUS WALLET DESBARRES, and the Honourable EDWARD BRABAZON BRENTON, Assistant Judges of the Court, or either of them, the Plaintiff being Chief Justice, and consequently incapable of sitting upon the trial of his own cause :—

The question which has arisen in this case is, whether the Assistant Judges of this Court are competent in point of jurisdiction, to try a cause in which the Chief Justice is a party, and consequently cannot sit on the Bench and perform the office of Judge in his own cause.

By the Common Law, no man can be a Judge in his own cause, nor do any act as a Judge in which he is interested, so that even the first process to bring the party into court could not be tested in his name, nor could any bill be filed against him *coram seipso et aliis sociis suis*.

All writs to bring parties into court must be in the King's name, and under the seal of the Court, and tested in the name of a Judge of the Court, testifying them to be the act of the Court and not the act of the Judge or Judges personally, or out of court, as a precept may be to the Sheriff to summon jurors before Justices of Oyer and Terminer. It follows from hence that if the Chief Justice, becoming a party in a cause, tolls the jurisdiction of the court ; or, in other words, if the Court can exercise no jurisdiction in a cause wherein he is a party, no cause can be instituted either by or against him, and therefore there would be a failure of justice.

To issue process there must be a court capable of discharging its functions, the issuing of the process being in contemplation of Law the award of the Court, but the Chief Justice is sitting in court, and, while there, cannot award process or do any other act wherein he is interested, and consequently no process could be awarded while he remained on the Bench; but as soon as he retires to afford the opportunity for his brother Judges to take cognizance of the matter (if the doctrine now contended for be true) there will cease to be any Court, the other Judges having no jurisdiction to hold the Court in his absence—ergo, whatever they might do would be simply *coram non judice*, and void.

It is now to be considered whether the Act authorising his Majesty King George the Fourth to institute this Court must be construed in such a manner as is now contended for. The Act is entitled "An Act for the *better* administration of Justice in Newfoundland, and for other purposes"—and it is thereby enacted that it shall and may be lawful for his Majesty, by his Charter or Letters Patent under the Great Seal, to institute a superior court of judicature in Newfoundland, which shall be called "The Supreme Court of Newfoundland;" and the said court shall be a court of record, and shall have all civil and criminal jurisdiction whatever in Newfoundland, and in all lands, islands and territories dependant upon the government thereof, as fully and amply, to all intents and purposes, as his Majesty's Courts of King's Bench, Common Pleas, Exchequer and High Court of Chancery, in that part of Great Britain called England, have, or any of them hath; and the said Supreme Court shall also be a Court of Oyer and Terminer and general Gaol delivery in and for Newfoundland, and all places within the government thereof; and shall also have jurisdiction in all cases of crimes and misdemeanours committed on the Banks of Newfoundland, or any of the seas or islands to which Ships or Vessels repair from Newfoundland for carrying on the fishery.

2nd Section. "And be it further enacted that the said Supreme Court shall be holden by a Chief Judge and two Assistant Judges, being respectively Barristers in England or Ireland of at least three

years standing, or in some of his Majesty's Colonies or Plantations, who shall be appointed to such their offices by his Majesty, his heirs and successors: Provided always that it shall be lawful for his Majesty, his heirs and successors, from time to time as occasion may require, to remove and displace any such Chief Judge, or Assistant Judge as aforesaid, and in his stead to appoint any other fit and proper person, being a Barrister as aforesaid, to be the Chief Judge or Assistant Judge of the said Court, as the case may be: And provided also that in case any such Chief Judge or Assistant Judge shall be absent from Newfoundland, or die, or resign such his office, or by reason of sickness or otherwise shall become incapable of performing the duties thereof, then and in every such case it shall be lawful for the Governor or Acting Governor of Newfoundland for the time being to nominate and appoint some fit and proper person to act as Chief Judge or Assistant Judge, as the case may be, in the place or stead of the Judge so being absent, dying, resigning his office or becoming incapable of performing the duties thereof, until such Judge shall resume the duties of his office, or until a successor shall be appointed by his Majesty, his heirs and successors; and the said Chief Judge and Assistant Judges shall respectively have and exercise such and the like powers and authorities in Newfoundland, and in all places dependant upon the Government thereof as any Judge of any of his Majesty's said Courts of King's Bench, Common Pleas, and Exchequer, or as the Lord High Chancellor of Great Britain, hath or exercises in England."

3rd Section. "And be it further enacted, that all issues of fact which may be joined between the parties in any action at law, originally brought before the said Supreme Court of Record, or which may be joined upon any criminal information or prosecution depending in that Court, shall be tried at the town of St. John's, in the Island of Newfoundland, by a jury of twelve men; and for the purpose of hearing and trying all suits, actions, and all informations, prosecutions, and other proceedings of what nature or kind soever, which may be brought or commenced in the said Supreme Court, one or more term or terms, or session or sessions, of the said Court, shall be held at the

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Town of St. John aforesaid, in each year, by the said Chief Judge and Assistant Judges, at such times as the Governor or Acting Governor of the said colony shall from time to time by any proclamation to be by him for that purpose issued, direct and appoint."

It is manifest from the whole scope and tenor of this Act, that the intention of the Legislature was to establish a Court of Supreme Jurisdiction and authority, with powers as large and ample as those possessed by the King's superior Courts in England, and therefore the Act is to be construed liberally, with a view to the efficient discharge of the duties thereby imposed upon the Court, and it is not to be construed strictly, as Acts creating new Jurisdictions usually are, thereby excluding all authority not specifically given. And therefore in construing this Act, the common Law must be regarded, and no power or authority possessed or exercised by the Courts in England, should be excluded, which is not expressly excepted in clear and direct terms. In other words, this Act must be construed in connection with the Common Law which the Act was passed to carry into effect. By the Common Law, the Act of any one or more of the Judges of the Superior Courts in Westminster Hall, in Court, is the Act of the Court, and one Judge, in common experience, frequently sits and determines matters, as if the Court were full—he, of course, exercising a sound discretion in determining only such points as are of an ordinary character, and upon which he is convinced there would be no difference of opinion were the Court full. Now, unless the terms of the Act plainly require the presence of the three Judges to constitute a Court, the Common Law powers of Judges of a Court of Supreme authority shall not be abridged by construction.

By the Common Law, the Judges and other officers of the Court are privileged to bring actions in their own Court, and may plead their privilege, should any person attempt to draw them before another tribunal. So decided and inalienable is this right, that even the negative words of Magna Charta were not considered sufficient to take it away. By Magna Charta "*Communia placita non sequantur curiam nostram,*" and yet, common pleas, wherein the officers of K. B., were parties, were held

coram rege, on account of their privilege. And so if any persons were in *custodia mareschalli*, they should have privilege of K. B., and, therefore, lest there should be a failure of justice, (which Lord Coke says is so much abhorred in Law,) they shall be impleaded in B. R. by Bill, even in Common Pleas, notwithstanding the negative words of the said Act of Magna Charta 4, Inst. 71.

But there are no negative words in the Judicature Act of this Island; the terms used, as before stated, are these, "the Supreme Court shall be holden by a Chief Judge and two Assistant Judges," each of whom is required to possess the same qualification for appointment; and by the proviso at the end of this clause, "the said Chief Judge and Assistant Judges shall respectively (a distributive adverb) have and exercise such and the like powers and authorities in Newfoundland, as any Judge of any of His said Majesty's said Courts of King's Bench, Common Pleas, and Exchequer, or as the Lord High Chancellor of Great Britain hath or exercises in England."

In England any one Judge can legally hold any of the Courts of which he is a Judge. It is true that in a former part of the Section, the Governor is authorized, should a Judge, in case of absence from the Island, death, resignation, sickness, or otherwise become *incapable* of performing the duties of his office, to appoint a person to act in the stead of the Judge so incapacitated. But this, even, is not mandatory; it is a mere authority obviously to be exercised only in case of necessity. The incapacity here spoken of is clearly personal; and that incapacity which is not expressed, must have a relation to those which are put for instances. If it were possible to institute a suit against the Chief Justice, before the other Judges, (which it would not, if the construction contended for were true,) yet he would not be "incapable of performing the duties of his office;" he would be incapable of sitting as a Judge in his own cause, but not of performing the general duties of his station. The absurdities and positive evils to which such a construction must necessarily give rise, are a sufficient refutation of it. By the words of the Act, the person to be appointed in the place of the Judge becoming incapable, shall act until such Judge shall resume the duties of his office, which he may do whenever he thinks proper. As soon there-

fore as his cause has been tried, or indeed when the Jury retire to consider of their verdict, and another cause is called on, in which the parties have a right to the exercise of his talents, he being under no disability, takes his seat; the Jury return into Court, perhaps the next day, having been out all night, considering of their verdict, and, during this time, another cause has been tried, in which he has taken a part, and thereby determined the commission of the gentleman appointed in his place during the trial of his own cause,—what is to be done?—If the Judge retires, there is no Court to take the verdict, until a new commission be made out. But if he had abstained from taking his seat until the verdict had been recorded, perhaps his opponent might have desired to move for a new trial, in arrest of judgment, or for such other relief as he might feel himself entitled to; the Judge being a party, and having resumed his seat, cannot sit to hear a motion in his own cause, and, therefore, a new commission must be sent for to fill up the *hiatus* occasioned by his secession, and thus, during a whole term, the business of the Court would be rendered ludicrous by the constant change of judges. And it might so happen that no man who had any respect for himself would accept of such brief authority, and expose himself to the obloquy which his decision in an individual case might expose him to, when his general demeanour would have explained any particular point of conduct in the one case, had he been allowed to retain his situation long enough to have his character fairly appreciated. But the very idea of the Executive Government appointing a particular Judge to try a particular cause, when duly considered, must be revolting to the mind of any man who has been bred in a country where public liberty rests upon the firm basis of equal laws. How would such an appointment at this day accord with the noble declaration of George the Third, of illustrious memory, made at the commencement of his glorious reign—that "he looked upon the independency and uprightness of the Judges of the land, "as essential to the impartial administration of "Justice; as one of the best securities to the rights "and liberties of his loving subjects, and as most "conducive to the honour of the Crown; and therefore recommended to Parliament to make pro-

"vision for securing the Judges in the enjoyment of "their offices during good behaviour, notwithstand-"ing the demise of the crown."

It is true the Judges in this colony are appointed and removable at the pleasure of the Crown; but it would be a gross abuse of the prerogative of the Crown to remove a Judge upon a suggestion that some person wished to bring an action or file a bill against him and to appoint a successor *pro hac vice* to determine the case.

The Sovereign is the grand depository of the Justice of the nation, and enjoys the sole prerogative of appointing Judges to distribute that justice to all suitors; but the Crown can only make those appointments in the accustomed methods and upon general principles; and I deny that the Sovereign can authorise any Judge, or number of Judges, to try a specific case. Such a power might be wielded to the destruction of the liberty of individuals, and ought never to be submitted to if attempted; and in my person, the first example of such an exertion of power shall not, at my solicitation, or with my consent, be ever attempted; for no man ought to submit to it, however agreeable to his private wishes the appointment might be; and therefore I cannot think of proposing that a course shall be adopted in my case, which, in my conscience, I think no man should acquiesce in. The Judicature act obviously contemplates no such appointment, and the common law prerogative of the Crown, I feel confident, will never be stretched to reach the case.

It may perhaps be said that the Judge might retire for the whole of the period during which his cause was pending in the Court. He certainly might, if he chose, resign his office because a tradesman has thought proper to bring an action against him for his account; but it is not probable. And the administration of public justice must rest upon foundations not to be disturbed by the caprice of individuals. The Supreme Court is a Court of equity, and if filing a bill against one of the Judges would have the effect of driving him from the Bench until it was decided, the person appointed to supply his place during the contest, might have a more beneficial estate in the office than the reversioner. If such a course, however, can prevail in the case of the Chief Justice, it must also hold good with

regard to the Assistant Judges; and if a Judge is to be driven from the Bench by an action being threatened, (for it could not be instituted against him if there be no Court without him,) or if he must retire and seek a successor whenever he shall think proper to resort to the laws of his country when he shall feel himself aggrieved, it necessarily follows, that should three tradesmen institute as many actions against the three several Judges, they would all be excluded while these causes were pending, and their successors might not find it desirable to be too expeditious in giving judgments, and might delay the final decision for an indefinite period, and thus, by the act of three trades people, or even labourers, might the Bench be entirely changed, and the legitimate Judges of the land made to give place to persons totally unqualified to fill their stations; and this process might be repeated every term, and the rightful Judges be perpetually excluded. But give the Judicature Act its proper construction, and all these difficulties will vanish; and every man in the place might deluge the Court with writs against the Judges, without impeding the ordinary course of justice any more than if the suits were instituted against any other persons.

That such a state of things could ever have been contemplated by the British Parliament when framing the Judicature Act, is not to be presumed; and therefore the removal of a Judge, every time he became a party to a suit, could never have been intended, neither can it be conceived that justice was to be altogether withheld in cases where Judges were parties. The Act, however, is not obnoxious to such an inconvenient interpretation, and if it be construed according to those principles which are applicable to the subject, justice will not be denied nor delayed, nor will any of the inconveniences arise, of which not a hundredth part have been suggested, but the public business will be thereby despatched as it is in other countries similarly situated.

The Judges are the constitutional expositors of all Acts of Parliament, and they are to make such construction as shall advance the remedy, and give life and vigour thereto—3 *Coke*, 7, *Heydon's* case. And to this intent, and to give an Act such a construction as shall be agreeable to reason, they often

...nstrue it even contrary to the text—*Plowden*, 109. But it would be contrary to reason and equity, that a Judge should either be a party to the decision of his own cause, or that he should not have any remedy at all, and that no man should have a remedy against him; therefore, if it were necessary by the express words of the Act that all the three Judges should be present while the Court is holden, this case of a Judge being a party, would be excepted by operation of the Common Law, and for the advancement of the remedy given by the Judicature Act, namely, the better administration of justice, See *Plow.*, 109, for the principle.

In construing Acts of Parliament, every word and sentence shall, if it be possible, have its full effect, and no word or sentence shall be regarded as superfluous or unmeaning, if it be possible, having due regard to the whole, to give to each its full effect. 1 *Shower's Rep*, 108, *Bac. Ab. Tit. Stat.* 2. But if the construction here contended for be the correct one, the words extending to the Judges "respectively" the powers of the Judges in England, will have no operation, and will be controled by the more doubtful words "hold the Court," in the former part of the section.

The Court is perpetual, and never ceases to exist, although it can only sit for the despatch of business, and trial of causes, in term time; and there would be a Court existing in Law in the Island, although all the Judges might be dead; and it is well known that a great deal of business is transacted in Chambers, and by any one Judge; and any matter which may be done in chambers, may also be moved in Court. Now, it would be a monstrously absurd construction of our Judicature Act, to declare that by it a Judge might grant time to plead, for instance, or set aside an interlocutory judgment in chambers; but that, if sitting in open Court, he could do no such thing until joined by his Brother Judges. In the KING vs. WILKES, BURR. 2569, Lord MANSFIELD says, a great deal that may be done in Court, is done by Judges in Chambers, in term time; in vacation, a great deal more is done by them at chambers. Now, unless it shall be determined that a Judge can do nothing in chambers, this absurdity will necessarily follow—namely, that a Judge in chambers, for the convenience of the Court,

for the expedition of business, and the general advancement of justice, may order, in the place and stead of the Court, a thing to be done *ex. gr.*, an amendment to be made in a declaration or plea, but that he and another Judge with him could not do the same thing if they were sitting in Court, in the absence of the third. Such a construction may, perhaps, be law, but until I shall hear it so decided by the Privy Council, I shall never believe it to be so. Again, if any temporary absence of a Judge shall paralyze the powers of the Court, a cause might be stopped in the midst of a trial, by the sudden illness of one of the Judges. He might retire, and find himself incapable of returning What is to be done if this construction be correct. In his absence there is absolutely no Court; consequently, those remaining in the Court-room cannot adjourn or give any order, or appoint any time for re-assembling, and thus the Suitors, Jurors, Judges, Witnesses and all, would be resolved into a body of mere by-standers, and would walk off when they felt inclined, without any adjournment, or a word being said as to the cause of so strange a termination of the morning's proceedings, unless some one got up and informed the by-standers of the cause of the dilemma. Yet this absurd state of things would result from such a decision as that now contended for.

When the provision of a statute is general, it is subject to the control and order of the common law. The Judicature Act says in general terms that the Court shall be holden by a Chief Judge and two Assistant Judges. By the Common Law, a Judge cannot sit in judgment in his own cause; but the Judge of a superior Court is entitled to try his cause in his own Court; therefore the Common Law will restrain the general expression of the Act; and except a case wherein one of the Judges is a party, 1 *Show.* 455. *Bacon ab. Statute.* Again, such construction ought to be put upon a Statute as shall best answer the intention of the makers, for *qui hæret in litera hæret in cortice, Bac. Statute* 457 — *Plow.* 467.

That which is within the letter of a Statute is not within the Statute unless it be within the intention of the makers. Thus the Statute of Marlebridge prohibits generally the driving of a

distress taken in one county, into another; but yet it has been adjudged that if land holden of a manor in one county lie in another county, the lord may distrain upon the land and drive the distress into the county where the manor lies; for as it would be inconvenient, and a great loss to the lord if he could not drive the distress to his manor, and the tenant is not within the mischief provided against, this case, although within the letter, is not within the meaning of the Statute, 2 Inst., 106, yet such a construction is against the very words of the Act.

BLACKSTONE says, that Acts of Parliament that are impossible to be performed, are of no validity; and if there arise out of them collaterally any absurd consequences manifestly contrary to common reason, they are, with regard to those collateral consequences, void. He adds, I lay down the rule with these restrictions, though he says, "I know it is generally laid down more largely that Acts of Parliament contrary to reason are void. But if Parliament will posititively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the Constitution that is vested with authority to control it: and the examples usually alleged in support of the sense of the rule do none of them prove that where the *main object of the Statute is unreasonable*, the Judges are at liberty to reject it, for that were to set the judicial power above that of the Legislature, which would be subversive of all government. But where some *collateral* matter arises out of the *general words*, and happens to be unreasonable, there the Judges are in decency to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the Statute by Equity, and only *quoad hoc* disregard it. Thus, if an Act of Parliament gives a man power to try all causes that arise within his manor of Dale, yet if a cause should arise in which he himself is a party, the Act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel." 1 *Bl. Com.* 91. – 8 *Co.* 118. *Dr. Bonham's case.*

So in the present case, the Judicature Act of Newfoundland provides that the Supreme Court shall be holden by a Chief Judge and two assistant Judges; yet, if a cause should arise in which one of the Judges is a party, the Act should be construed

not to require the presence of the Judge who is a party, when the Court shall sit to try that cause, which would be, in the language of Lord Coke, just cited against common right and reason; neither shall these affirmative and directory words receive so literal a construction as to make it imperative upon the whole three to hold the Court, and so render it impossible that the cause shall be tried at all, which would be equally repugnant and against common right.

A man ought not to rest upon the letter of a statute only, but he ought to rely upon the sense, which is tempered and guided by equity, and therein he reaps the fruit of the law; for, as a nut consists of a shell and a kernel, so every statute consists of the letter and the sense. And in order to form a right judgment, when the letter of a Statute is restrained, and when enlarged by equity, it is a good way when you peruse a Statute, to suppose the lawmaker to be present, and then ask him the question you want to know touching the equity, then give yourself such an answer as you imagine he would have done if he had been present. *Plow.* 467.

If the question had been put in the course of debate, upon the passing of the Judicature Act, whether it were intended either that a Judge should sit upon the trial of his own cause, or that he should be without remedy, and all persons be without redress against him,—what would have been the answer? Can any man of common discernment doubt? It is not, therefore, the mere words of the law, but the internal sense of it, that makes the law, and our law consists of two parts—the body and the soul—the letter is the body, and the sense and reason, the soul; *quia ratio legis est anima legis.* And it often happens that when you know the letter, you know not the sense; for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. *Plow.* 465.

The words of a Statute ought not to be expounded to destroy natural justice. *Sti.* 81. And when words *per se* are repugnant and absurd, what is necessary may be supplied by construction and reasonable intendment. So that the words of the Judicature Act, if ordinarily to be understood, as requiring the presence of the three Judges to hold the

Court, shall, in the event of a Judge being a party, be construed not to extend to such a case, but it shall be saved by a necessary exception to be fairly understood, though not expressed. So that where one Judge is a party and cannot hold the Court, the other Judges shall, to prevent a failure of justice. Magna Charta says *Assisæ non capiantur nisi in suis comitatibus*, and yet if a man be disseized of a Lordship Marcher in Wales holden of the King in Capite, the writ of Assize shall be directed to the Sheriff of Gloucester, albeit the land was out of the County of Gloucester, and within the dominion of Wales; and mark the reason — Because the Lord Marcher, though he had *jura regalia*, yet could he not do justice in his own case, and therefore this case, of necessity, is excepted out of the Statute. And it is well observed *quamvis prohibetur quod communia placita non sequantur curiam nostram, non sequitur propter hoc quin aliqua placita singularia sequantur dominum regem*; and the like in this negative Statute of novel dissiezure. 2 *Inst.* 25.

So, for the like reason, although the Statute of Merton says, that the first jurors and other neighbours and lawful men shall take inquisition upon a re-disseisin, this must be understood where there were jurors at the first assize; for if there were none, then the inquisition on the re-disseisin shall be tried *per alios*, for the Statute shall not be so literally expounded that if it cannot be tried *per alios*, it shall not be tried at all. 2, *Inst.* 84. So in the case now in hand; the Judicature Act shall not be construed so literally that if one of the Judges, being a party, cannot be present to hold the Court, the cause in which he is so interested shall not be tried at all.

By 1, Ann, cap, 18, sec. 5, all matters concerning the repairing of Bridges and Highways thereinbefore mentioned, shall be determined in the County where they lay, and *not elsewhere*; and yet the Court of King's Bench granted a *Certiorari* to remove the record in order that it might be tried in another county, because the inhabitants of the county being parties, if it could not be removed, the indictment must have been tried by the very persons who were parties in the cause. And this, Lord Kenyon says, would have been an anomalous case

In the law of England, 6. *T. R.* 195. Now there is no other court in which this cause can be tried; and if there were, as a Judge of a superior Court, the Plaintiff has a privilege to have it tried here by the Common Law; but if the act be so construed as to require his presence, then he must either sit in judgment in his own case or be without redress.

The terms of the Judicature act are affirmative and directory, but not compulsory; and consequently any act done in Court by one or two Judges shall be as available as if done by all.

By the 54 Geo. 3d., cap. 84, it is enacted, that in future the Michælmas Quarter Sessions should be held, for every County, in the first week after the 11th of October. The Sessions for Leicester were held on Saturday the 12 of October, in the same week of, and not after the 11th, as required by the Statute; and, an order of Sessions having been removed into the King's Bench which had been made at those Sessions, it was contended that it was *coram non judice*, and void, *sed non allocatur*, for the words of the statute being in the affirmative only, are not imperative, and the Sessions were declared to have been well held, 7, *B. & C.* 12. So, here, if the Judicature Act had said that the Court should be holden by the Chief Justice and two Assistant Judges, and not otherwise, or by a less number, then the Act would have been imperative, but now it is only directory, at most.

But it is submitted, that inasmuch as the question appears upon the record, it ought not to be decided incidentally, unless it be palpable and clear of doubt; but the cause should be tried, and the parties left to their appeal. Any other course will be a manifest denial of justice.

In a very celebrated case of MOSTYN *vs.* FABRIGAS, reported in *Cowp.* 160, it was urged by the Counsel for Governor MOSTYN, that he, being a Governor of a Colony, (Minorca) was answerable civilly for no injury whatsoever done by him in that capacity; and, secondly, that the injury being done in Minorca, out of the Realm, was not cognizable by the King's Courts in England. And Lord MANSFIELD, who delivered the judgment of the Court, (it was on a Writ of Error from the Common Pleas to the King's Bench) said, there is nothing so clear as that, to an action of this kind, the Defend-

ant, if he has any justification, must plead it; and there is nothing more clear than that if the Court has not a general jurisdiction of the subject matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. In every plea to the Jurisdiction, his Lordship says, you must state another jurisdiction; therefore, if a matter is brought here, arising in Wales, to bar the remedy sought in this Court, you must shew the jurisdiction of the Court in Wales; and, in every case, to repel the jurisdiction of the King's Court, you must shew a more proper and sufficient jurisdiction; for, where there is no other mode of trial, that alone will give the King's Courts a jurisdiction. So, in this case, the Defendants, instead of pleading the General Issue, should have pleaded to the jurisdiction of the Court, composed of the two Judges, before whom the record states the Action to have been brought, and to be pending, and, so doing, they must have shewn another jurisdiction, and it is not for the Court themselves, *ex mero motu*, to make the objection after plea pleaded, acknowledging their jurisdiction; but, on the contrary, they should, in the language of the Court, strain hard to support their jurisdiction, unless they could, upon plea to the jurisdiction, have shewn another jurisdiction, to which the matter properly belonged, and ought to be referred.

And it is a principle, that a Court will not, on motion, where the Law is doubtful, decide the question, but will leave the party to their Writ of Error, or *audita querela*. *Har. Dig.* 209, 1 *Bac. Abr.* 312, Lord PORCHESTER *vs.* PETRIE.

And, upon the argument of a special case, where a doubtful point of Law arises, they will give leave to the parties to turn the case into a special verdict, in order that the point of Law may be raised upon the record, and the question carried, by Writ of Error, to the last resort. *Tidd.* 898, and the cases there cited.

The Court, as now composed of the Assistant Judges, has awarded a Special Jury to try the cause after having heard a motion and granted a rule at the instance of the Defendants, which was argued and disposed of by the present Judges, and not without their jurisdiction being questioned — for it was denied at first by all the defendants, though after-

wards acquiesced in; and the two Judges have not only heard motions in this cause, but in others also, and have granted rules thereon, which proves beyond a doubt that the Judges considered themselves to possess jurisdiction as a Court, otherwise they should not even have opened the Court until the Chief Justice took his seat with them on the Bench; but so far from adopting that course the Minute Book of the clerk will shew that the Court was opened by the two Judges, on Wednesday the sixth day of December, in this term, and that they sat all that day and transacted business; and should they now refuse to proceed with the trial of this cause because the Court is not full, they will be declaring that all they did on those days, when they so sat alone, was illegal and void.

The two Judges, when sitting, in banco, after the usual formalities have been gone through of opening the Court, are competent to hold the Court and transact business there, or they are not. If they are not, they could neither open the Court nor adjourn it, because the Court, and nothing but the Court, can adjourn itself. But they have not only met and adjourned, but have heard arguments, received motions, and granted rules, thereby admitting themselves *quoad hæc* to be a Court: but yet it is contended they are not a Court for the trial of a cause. There is no such distinction;—if they are competent to meet, open the Court, and adjourn, they are competent to try this cause; and there is no distinction in Law as to questions which require any particular number of Judges to be present. If one Judge in the King's Bench can hear a motion to refer a note of hand to the Master upon a judgment by default, he may try an issue at Bar so far as jurisdiction is concerned; it is not a question of jurisdiction but of discretion, what business he will hear, when sitting alone. Should the Judges therefore now stop short and refuse to proceed to try this cause after having awarded a Special Jury, and allowed the parties to incur expense in preparing for trial, the Records of the Court will present features more anomalous than were ever before exhibited by a Court of such high authority in any country professing to be governed by equable laws systematically administered.

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